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IN THE

Supreme Court of the United States

HERSHEL HAMMON,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

On Petition for Writ of Certiorari to the Indiana Supreme Court

BRIEF OF *AMICI CURIAE* THE PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

Public Defender Service for the District of Columbia represents indigent criminal defendants. *Amicus curiae* National Association of Criminal Defense Lawyers is a non-profit corporation with a membership of more than 10,000 attorneys nationwide, along with 78 affiliate organizations numbering 28,000 members in 50 states.[1]

[1] Accompanying this brief are letters of consent to its filing. No counsel for any party authored any part of this brief, and no person or entity, other than *amici*, has made a monetary contribution to the preparation or submission of this brief.

Amici have already filed a brief in support of Petitioner in *Davis v. Washington*, Docket No. 05-5224, in which we discussed the urgency of resolving the significant interim uncertainty that remains about what constitutes a "testimonial" statement necessitating confrontation under *Crawford v. Washington*, 541 U.S. 36 (2004). As *amici* demonstrated, that confusion is particularly acute in cases where the prosecution relies on "excited" criminal accusations made by an absentee witness in response to questioning by a 911 operator or a responding police officer. *Amici* support the grant of writs of certiorari in *Davis* and *Hammon* to address the legal confusion surrounding the admission of unconfronted accusatory statements to 911 operators and responding officers respectively.

Having set forth in *Davis* what we see to be the primary source of legal confusion and division in the lower courts when examining "excited" accusatory statements to government agents—the failure to use the common-law right to confrontation as the touchstone to determine which statements are "testimonial"—we explain in this brief why Mr. Hammon's case would serve as an excellent vehicle to address how *Crawford* affects the admission of unconfronted accusatory statements made to responding police officers, just as *Davis* would serve as an excellent vehicle to address *Crawford's* application to accusatory statements to 911 operators. *Amici* again encourage this Court to grant certiorari in both *Hammon* and *Davis*, as it has done in other related cases addressing a complex issue with widespread impact,[2] in order to put an end to the substantial uncertainty that currently plagues this important area of the law.

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[2] *See, e.g., Van Orden v. Perry*, 125 S. Ct. 346 (2004), and *McCreary County, Ky. v. ACLU*, 125 S. Ct. 310 (2004) (whether ten commandments displays violate the Establishment Clause); *Ewing v. California*, 535 U.S. 969 (2002), and *Lockyer v. Andrade*, 535 U.S. 969 (2002) (whether applications of California's Three Strikes Law violated the Cruel and Unusual

STATEMENT OF THE CASE

Hershel Hammon's conviction for domestic battery rests entirely on the testimony of Peru, Indiana police officer Jason Mooney, who concededly witnessed none of the pertinent events that precipitated the charges and obtained all of the information he recited at trial through questioning Mr. Hammon's accuser (Amy Hammon) during his investigation of the incident. *Amici* adopt Petitioner's statement of the case, *see* Petition for Writ of Certiorari (Pet.) at 1-7.

REASONS FOR GRANTING THE PETITION

Amici have already discussed in detail in our brief in support of Adrien Davis' Petition for a Writ of Certiorari, Docket No. 05-5224 (hereinafter "*Davis Amici*'s Brief") why this Court must act promptly to resolve the fundamental disagreement about the meaning and scope of the confrontation guarantee that has arisen in the wake of this Court's decision in *Crawford v. Washington*. We will not duplicate that discussion here, except to note that there is a striking division among appellate courts regarding the "testimonial" nature of "excited utterances" made to 911 operators and responding police officers, as described in Mr. Hammon's Petition and in the briefs submitted by Mr. Davis and *amici* in *Davis v. Washington*, Docket No. 05-5224. *Amici* also note once again that this division has matured and solidified. Indeed, new decisions emerge daily that confirm and entrench these divisions. *See, e.g.*, *Commonwealth v. Gonsalves*, ___ N.E.2d ___, 2005 WL 2046000, at *6, 8-9 (Mass. Aug. 29, 2005) (rejecting the Indiana Supreme Court's analysis in *Hammon*, looking to

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Punishment Clause); *Sutton v. United Air Lines*, 527 U.S. 471 (1999), and *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999) (whether "correctable" disabilities are covered by Americans with Disabilities Act); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) (whether employers are vicariously liable for sexual harassment under Title VII).

Crawford and "the historical purpose of the confrontation clause," and holding that "*all* statements the declarant knew or should have known might be used to investigate or prosecute the accused" including statements taken by responding officers engaged in "preliminary fact gathering" and "spontaneous utterances" are testimonial); *State v. Parks*, 116 P.3d 631 (Ariz. App. 2005) (looking to the "historic underpinnings" of the Confrontation Clause and holding that "excited utterances" to a responding police officer were testimonial); *State v. Wright*, ___ N.W.2d ___, 2005 WL 1903860 (Minn. Aug. 11, 2005) (holding that "excited utterances" to 911 operator and responding police officer were nontestimonial based on an ahistorical analysis of, *inter alia*, emotional state of the declarant and motives of the questioner).

Hershel Hammon's case is an excellent vehicle for resolving the basic disagreement surrounding the "testimonial" nature of accusations made to responding police officers, where those accusations are nonetheless admitted in the absence of confrontation under state hearsay law as "excited utterances." In part, as Petitioner notes, Mr. Hammon's case is an appropriate one because there are no procedural impediments to this Court's review of the merits: The confrontation issue was raised by defense counsel in the trial court and on appeal, was the subject of two detailed appellate decisions in the Indiana courts, and the issue is dispositive to the outcome of Mr. Hammon's case. *See* Pet. at 4, 24; Tr. 5-9-03 at 6-9, 11, 13-15, 24, 30-32.

But Mr. Hammon's case is also a worthy candidate for review because the Indiana Supreme Court's opinion mirrors the reasoning of a number of appellate decisions around the country—reasoning other courts have rejected and that *amici* believe to be irreconcilably in conflict with this Court's *Crawford* decision and with the common law confrontation right embodied in the Confrontation Clause. *See Davis Amici's* Brief at 5-8 (explaining that *Crawford* reconnected

the constitutional right to confrontation to its common-law roots). In particular, the Indiana Supreme Court's opinion in Mr. Hammon's case shares at least four attributes with lower court decisions from around the country that interpret *Crawford* and the constitutional confrontation guarantee both too narrowly and without reference to the common law. Granting Mr. Hammon's petition will accordingly allow this Court to provide critical guidance on all of these important topics:

1. **The Indiana Supreme Court treated as unremarkable for confrontation purposes the fact that the entirety of the prosecution's case consisted of a criminal accusation made by an absentee witness to an "investigating" police officer.**

Like *Davis v. Washington*, Mr. Hammon's case is representative of a group of post-*Crawford* appellate decisions that treat as unremarkable the absence at trial of any percipient witness to the alleged crime. In fact, the Indiana Supreme Court acknowledged that this case "presents an all too familiar scenario: the police respond to a report of domestic violence, an apparent victim reports a battery, and the victim then does not testify at trial . . . ." App. A (*Hammon v. State*, 829 N.E.2d 444, 448 (Ind. 2005)). And yet, the Indiana Supreme Court determined that this "report" to police—which consisted entirely of a criminal accusation made to an "investigating" police officer[3]—was not "testimonial" under *Crawford*, even though it was a product of Amy Hammon's third interview with police (the interview at the door being the first and the interview with Officer Richard being

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[3] After speaking to Amy Hammon at her door, Officer Mooney entered the house and interviewed Ms. Hammon again because he felt it was his duty "to investigate further," even though Ms. Hammon initially told him that "everything was okay." App. C (Tr. 5-9-03 at 8, 18); *see also* App. C (Tr. 5-9-03 at 24) (police "separate[d]" Mr. and Ms. Hammon in order "to investigate"); App. D (Officer Mooney signed Battery Affidavit as the "investigating officer").

the second[4]), and even though Ms. Hammon, the "victim/witness," immediately followed this "report" by completing a "battery affidavit" formally accusing Mr. Hammon of a crime under penalty of perjury.[5] It is no stretch to say that the admission at an American criminal trial of such unconfronted testimony, procured as it was through close interaction with police from a person explicitly labeled by the police as a "witness," would have "astounded" the Framers. *See Crawford*, 541 U.S. at 66. Nonetheless, the Indiana Supreme Court did not even note in passing that such a prosecution would have been exceptional (and squarely forbidden) at common law, *see Davis Amici's* Brief at 17-20, nor did it attempt to square its decision with the plain language of the confrontation guarantee, which requires confrontation of all "witnesses against" the "accused" in every "criminal trial." U.S. Const. amend VI.

2. The Indiana Supreme Court's definition of "testimonial" focused on its speculation as to what motivated the absent witness to speak rather than looking to whether an objective witness would have reasonably anticipated the use of her statement in a criminal proceeding.

Mr. Hammon's case is also typical in that the Indiana Supreme Court's "testimonial" analysis improperly focused on what motivated the absent witness to speak to police. Like the Washington Supreme Court in *Davis* and many other courts around the country, the Indiana Supreme Court looked to whether absentee witness Amy Hammon made her accusatory statements to the responding police officers with the subjective "intent that . . . her statement[s] w[ould] be used against the defendant at trial." App. A (829 N.E.2d at 457).

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[4] App. A (829 N.E.2d at 446-47); App. C (Tr. 5-9-03 at 8); Record on Appeal ("R.A.") at 39 (Probable Cause Affidavit).

[5] Officer Mooney asked Ms. Hammon to fill out the affidavits as "a normal part . . . of [his] investigation." App. C (Tr. 5-9-03 at 12).

The court below concluded that Amy Hammon's statements were not "testimonial" because they were excited utterances, *id.* at 453, 458, and because her "motivation was to provide basic facts, and there is no suggestion that Amy wanted her initial responses"—as opposed to the statements she made moments later in a signed and sworn affidavit—"to be preserved or otherwise used against her husband at trial." *Id.* at 458.

As *amici* have previously explained, *see Davis Amici*'s Brief at 8-13, this focus on the motivation of the absent witness has no foundation in the common law and, by confusing the "testimonial" inquiry with the test for determining whether a statement is an "excited utterance" under state hearsay law, it also runs afoul of this Court's efforts in *Crawford* to disentangle the confrontation guarantee from hearsay rules. By contrast, an objective analysis of a witness's *anticipation* of the consequences of her statement focuses, as it did under the common law, on whether the statement is an accusation of a completed crime, whether it was made to a known government agent and whether, given these factors, a reasonable person would know the statement is one that might be used in a criminal proceeding.

In addition to being historically accurate, reliance on objective factors about what a witness would have reasonably anticipated makes it easy to determine when confrontation will be required because it does not require courts to speculate about the many idiosyncratic and possibly unknowable forces that might have "motivated" an absent witness to speak to police. Such an objective test would have precluded the Indiana Supreme Court from engaging in the inherently complicated and uncertain task of guessing what Ms. Hammon and Officer Mooney desired as a result of their conversation, *see Crawford*, 541 U.S. at 66 ("[o]nly cross-examination could reveal" "Sylvia [Crawford]'s perception of her situation"); *see also id.* (condemning the assumptions made under

the *Ohio v. Roberts* analysis that "cross-examination might well have undermined"). Instead this test would have forced the lower court to address a much simpler and more pertinent question—why a criminal accusation to police, made by a witness who signed a sworn statement explicitly acknowledging that her accusations would be used to commence legal proceedings, should not be deemed a "testimonial" statement under *Crawford*.

3. The Indiana Supreme Court decision appeared to limit *Crawford*'s protections to "formal" witness statements such as affidavits.

The Indiana Supreme Court drew a distinction of constitutional magnitude between Ms. Hammon's "battery affidavit," *see* App. D—which the court found to be "testimonial"—and the identical verbal accusations Ms. Hammon made to Officer Mooney only moments before during the same conversation, *see* App. C (Tr. 5-9-03 at 11-12). Such a distinction is far from unique, but is instead representative of the many decisions around the country that look to whether an out-of-court witness state-ment sufficiently mirrors the specific abusive mechanisms of Tudor, Stuart or Hanoverian England that were of immediate concern to the Framers. *See Davis Amici*'s Brief at 13 & n.9. But as *amici* have demonstrated, it turns history on its head to allow the sixteenth and seventeenth century mechanisms used to evade the common-law confrontation right to define the whole of that right as it is preserved in the Confrontation Clause. *Id.* at 13-15. After all, the civil law "abuses" were not offensive to the Framers simply because the facially accusatory statements obtained and used at trial by the government in infamous trials like Sir Walter Raleigh's were formally made and documented—rather, the Framers' primary concern with the use of *ex parte* affidavits and the like is that their formality was used as a justification to encroach upon the otherwise broad common-law right that entitled an accused to confront his accuser in open court. Thus, although the Framers were obviously

concerned with the more formal abusive mechanisms with which they were most familiar, there is every reason to believe that the informality of criminal accusations made to police soon after an incident would have *heightened*, not lessened, concerns about the use of such statements in criminal prosecutions. *See Davis Amici*'s Brief at 14-15.

4. The Indiana Supreme Court, in determining whether a statement is "testimonial," deemed the motive of police the "most important" factor in its analysis.

A final noteworthy feature of the Indiana Supreme Court's decision is its focus on the "motive of the questioner" in determining whether a statement is "testimonial" under *Crawford*. The court, in fact, deemed this factor to be the "most important" in its testimonial analysis. Again the lower court's analysis is representative. As the Indiana Supreme Court itself observed, many appellate courts seek to separate for confrontation purposes those statements obtained by police during their "preliminary investigation" from those obtained after a formal investigation has begun. App. A (829 N.E.2d at 454-56).

But the emphasis on the motivation of police in eliciting the statement finds no support in the common law, and neither the Indiana Supreme Court nor any of the lower courts that espouse this rationale claims a historical precedent for such an analysis. Instead, this analysis, and particularly its focus on the supposedly non-adversarial nature of police questioning during the preliminary investigation, are reminiscent of the discredited trial court ruling in *Crawford* itself. There, the trial court had found that confrontation of Sylvia Crawford's statement was not required because the law enforcement officer who questioned her was "neutral to her and not someone who would be inclined to advance her interests and shade her version of the truth unfavorably toward the defendant." *Crawford*, 541 U.S. at 66.

This Court emphatically rejected the trial court's reasoning, observing that the "Framers would be astounded to learn that *ex parte* testimony could be admitted against a criminal defendant because it was elicited by 'neutral' government officers." *Crawford*, 541 U.S. at 66. In short, as *Crawford* makes clear, the Confrontation Clause, now reconnected to its common-law origins, will not allow for an assumption that governmental agents have obtained criminal accusations in a "neutral" fashion—the Framers understood that there are no "neutral" government officials, but rather only investigative arms of the state who always act in an adversarial manner for confrontation purposes.

This is not to say that there is anything wrong with conducting investigations in an adversarial fashion or that police somehow act improperly when they obtain "testimonial" statements during the course of their investigations—a fact that the lower court, like many others, appeared to misunderstand when it limited testimonial statements to those elicited by the police in an effort to "pin down and preserve" information. App. A (829 N.E.2d 44). The confrontation guarantee was not intended to be some sort of addendum to due process protections against coercive questioning or *Miranda* warnings. It was not designed to discourage or encourage any particular police investigative procedure, and it was certainly not meant to steer police (as the Indiana Supreme Court's interpretation of "testimonial" would) toward cursory, hasty interviews of still-agitated witnesses, by shielding the participants in such *ex parte* examinations from confrontation. Rather, as *Crawford*, the text of the Sixth Amendment, and its common-law history make clear, the Confrontation Clause sets forth a trial right, the object of which is to ensure that, where the prosecution attempts to use any statements gained through one-sided police examinations as substantive evidence of guilt, those statements are subjected to the crucible of adversarial testing in the form of cross-examination. That lesson was lost on the Indiana Supreme Court in this case.

CONCLUSION

Granting the petition in both Mr. Hammon's case and in Mr. Davis's case will allow this Court to provide much-needed guidance about the purpose and scope of the Confrontation Clause, now that the Court has reconnected that guarantee with its common-law origins in *Crawford v. Washington*. Chief Justice Rehnquist rightly noted in his concurrence in *Crawford* that "thousands of federal prosecutors and tens of thousands of state prosecutors need answers as to what" is "testimonial," beyond that which was specifically designated as such in this Court's majority opinion. 541 U.S. at 75. The defense bar no less than federal and state prosecutors needs clarification of this important point of law, which arises daily in courts across the country in all sorts of criminal cases where percipient witnesses who have made post-crime statements that the prosecution seeks to use at trial fail to appear for any number of reasons. In short, "this is not an academic debate, but an issue of tremendous pragmatic consequence to the trial of criminal cases." *Gonsalves*, 2005 WL 2046000, at *23 (Sosman, J., concurring in part). To delay review of this important issue by denying a writ of certiorari in this case will perpetuate confusion in innumerable criminal cases throughout the nation.

Respectfully submitted,

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